IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 28 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GANESH CHHABABHAI VALLABHAI PATEL
Versus
COMMISSIONER OF INCOME TAX

Appearance:
1. INCOME TAX REFERENCE No. 28 of 1988
MR R.D. PATHAK for the assessee
MR B.B. NAIK for the Revenue

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 09/05/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench `C' has referred the following question for the opinion of the High Court under section 256(1) of the Income Tax Act, 1961 :

> "Whether on the facts and in the circumstances of the case, the I.T.O. was justified in passing order u/s 154 of the Income Tax Act, 1961? "

2. The matter pertains to Assessment Year 1980-81 in respect of which the assessment of the assessee family trust was completed on 24th November 1980 determining the total income at Rs.7,03,490=00. One half of that income i.e. Rs.3,51,745=00 was taxed in the hands of 25 beneficiaries as per clause 3(B)(i)(a) of the trust deed dated 23rd April 1979 shown in Schedule I thereto and the other 50% i.e. Rs.3,51,745=00 was assessed in the hands of the trustees of the assessee trust under section 161 of the said Act on the respective share of each of the beneficiaries mentioned in clause 3 (B)(i)(b) of the trust deed and Schedule II thereto.

2.1 In the trust deed, it was specifically stipulated that the trust was a specific trust and in clause 3(B)(i)(b), it was provided as under :-

> "It is hereby agreed and declared between the parties to this deed of the trust that the trustees shall stand and possessed the balance 1/2 part of the income which shall be receivable on behalf of and for the benefit of the persons mentioned in the Schedule II herein attached to this trust deed, and shall be divided as per share specified against each of them i.e. beneficiaries mentioned in Schedule II herein attached, but it is specifically made known that the said income is to be accumulated and not to be paid to the said beneficiary upto the period of 19 years from the date of this presents, and should be kept as separate Specific Corpus in the name of each of the said beneficiary."

2.2 The Schedule II which is referred to in the above

clause shows the names of beneficiaries of the assessee trust. Of the 23 beneficiaries, Srl. Nos. 1, 2, 3, 22 and 23 are Jayantibhai Chhababhai Patel as Karta of different HUFs. His name as beneficiary appears at Srl.No.19 and his wife's name at Srl. No. 20. The name of his child as his beneficiary appears at Srl. No. 21. His brother Keshavlal Chhababhai Patel is at Srl. No.5 and Keshavlal's wife is at Srl. No.6 and children of Keshavlal are at Srl. Nos. 7 and 8. Keshavlal Chhababhai Patel's name is also shown as Karta of different HUFs at Srl. Nos. 9, 10 and 11. The name of the other brother Shri Govindbhai Chhababhai Patel and his wife are at Srl. Nos. 12 and 13 and their children's names are at Srl. No.14 and 15. Govindbhai Chhababhai Patel is also shown as Karta of different HUFs at Srl. Nos. 16, 17 and 18. It is thus clear that all the beneficiaries are the three brothers, their HUFs and their children. Their share percentage is specified against their names which totals to 50% which was receivable on their behalf and for their benefit and was to be divided as per their share specified against each of them, as required by the aforesaid sub-clause (b) of clause 3(B)(i) of the trust deed. The amount which was so receivable as their share on their behalf as income was to be accumulated and only he payment was deferred for a period of 19 years. The amount was to be kept separate in the name of each of the beneficiaries. Therefore, as per the clause, the income accumulated year after year and was received on their behalf and kept in their account but only the payment was deferred for the period mentioned in that clause.

2.2 The Income Tax Officer subsequently noticed that the income falling to the share of each beneficiary was wrongly taxed at the rate applicable to the share of each beneficiary instead of the individual rate of tax calculated separately and applicable to the total income of each beneficiary. According to the I.T.O., this was a mistake apparent from record and therefore, a notice under section 154 of the said Act was issued to the assessee on 30th October 1984 asking it to show cause why the said mistake should not be rectified and tax at proper rate be levied.

2.3 The assessee, by letter dated 15th October 1984, raised a preliminary objection that the proposal to rectify the assessment was illegal as there was no mistake in the order of assessment apparent from the record. It was also submitted that the I.T.O. intended to make further inquiry in respect of each of the 23 beneficiaries and therefore, the alleged mistake was not

apparent from the record. The I.T.O. held that there was no force in this contention, because, there was no question of holding any further inquiry in respect of the income of 23 beneficiaries. According to the provisions of the Act, the total income of the beneficiaries had to be taken into account for the purpose of ascertaining the rate of tax that should be applied to the share income of the beneficiaries from the trust. Thus, there was a clear mistake of non-application of the correct rate of tax to the share income of each of the 23 beneficiaries which can be rectified under section 154 of the said Act. One more contention was raised before the I.T.O. which was to the effect that 50% of the income of the trust amounting to Rs.3,51,745=00 was to be accumulated for a period of nineteen years from the date of the trust deed and therefore, the 23 beneficiaries had not vested interest in the said income and since it was not paid to them, it lost its characteristic of being income. The I.T.O. held that this contention was devoid of any substance, because, the share of 23 beneficiaries were determined and known as could be seen from Schedule II read with clause 3(B)(1)(b) of the trust deed dated 23rd April 1979. It was further held that the assessee trust did not raise any objection in the original assessment when the share income of each beneficiary was taxed at the rate applicable to their share income. It was held that the decision of the High Court in C.I.T. v. M.K.Doshi reported in 122 ITR 499 (Gujarat) was rendered in a different context where the question involved was with regard to inclusion of the interest of beneficiary in the hands of the beneficiary's parent under the provision of section 64(v) of the Act. The I.T.O. held that since there could only be one assessment in respect of the total income of a beneficiary, the rate applicable to his total income could also be the rate applicable to his beneficial interest i.e. the share income from the trust. Referring to the provisions of section 161 of the said Act, the I.T.O. held that the beneficial interest of the beneficiary had to be assessed in the hands of the beneficiary under that provision and since that was not done in the original assessment, a mistake, in the calculation of, tax apparent from the record had occurred, which could be rectified under section 154 of the said Act. The I.T.O. therefore held by his order dated 19-11-1984 that the beneficial interest of each of the 23 beneficiaries will be taxed at the rate applicable to the total income of each beneficiary as mentioned in Annexure `A' and accordingly, total tax leviable in respect of interest of 23 beneficiaries came to Rs.1,10,473=00 as against the tax levied by the I.T.O. in the original assessment at Rs.35,103=00. The

assessment was accordingly modified under section 154 of the said Act.

3. The assessee trust preferred an appeal against the order of the I.T.O. and the C.I.T. (Appeals), observing that having gone through the facts of the two cases cited by the appellant's counsel and having seen the circular of the Board and on a consideration of the facts and circumstances of the case, he was of the view that the I.T.O. was not justified in making the proposed rectification in the case of the trust, as there was no mistake apparent from the record, allowed the appeal.

4. The Revenue appealed against the order of the C.I.T. (Appeals) before the Tribunal and the tribunal accepted the stand of the revenue that since the assessee trust had accepted the order originally passed by the I.T.O. taxing 50% of the income of the trust in respect of the 23 beneficiaries mentioned in Schedule II, it was too late in the day for the assessee to urge that even the assessment as originally framed was bad in law. It was held that the only issue which was required to be decided was whether the I.T.O. was justified in raising the levy of tax in the manner he did. The Tribunal held that the provisions of section 161 of the Act were clear and unambiguous, and that by miscalculating the rate applicable as per that provision, a mistake was committed which could be rectified under section 154 of the Act. It was, therefore, held that the C.I.T. (Appeals) was not justified in deciding the appeal in favour of the assessee. The rectification order was, therefore, restored.

5. The learned counsel for the assessee trust contended before us that it was apparent from the show cause notice dated 30th October 1984 issued under section 154 of the said Act that the I.T.O. had requested the assessee trust to intimate the total income assessed in each of the 23 beneficiary's cases as per the assessment orders made in their cases, which amounted to a further inquiry which was not permissible under section 154 of the said Act. It was argued that since other records namely, the assessment orders of the beneficiaries were called for, the mistake was not apparent from the record of the case of the assessee trust. Therefore, the rectification proceedings could not have been initiated. It was further argued that the original assessment which was completed on 24-11-1980 and which was sought to be rectified was itself contrary to law as laid down in Additional Commissioner of Income Tax v. M.K.Doshi, reported in 122 ITR 499 which was upheld by the Supreme

Court in reported in Commissioner of Income Tax v. M.R.Doshi, reported in 211 ITR SC 1. It was finally contended that the rectification order was contrary to the circular dated 24-2-1967 of the C.B.D.T. which according to the learned counsel directed the I.T.O. not to include the income of the beneficiaries in their total income for rate purposes.

6. The learned counsel for the assessee, in support of his contentions, relied upon the following decisions :

[a] The decision of the Supreme court in K.P.Varghese v. Income Tax Officer, reported in 131 ITR 597 was cited for the proposition that the two circulars of the Central Board of the Direct Taxes in question were binding on the Department and this binding character attaches to them even if they be found not in accordance with correct interpretation of sub-section (2) of section 52 of the Act and they depart or deviate from such construction. Referring to the decisions of the Supreme Court in Navnit Lal C. Javeri v. K.K.Sen, reported in 56 ITR 198 (SC) and Ellerman Lines Ltd. v. CIT reported in 82 ITR 913 (SC), it was held that it was well settled that circulars issued by C.B.D.T. under section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the act.

[b] The decision of this Court in Additional Commissioner of Income Tax v. M.K.Doshit, reported in 122 ITR 499 was heavily relied upon for the contention that when the income was to be accumulated, it could not be taxed. That was a decision in context of the provisions of section 64(v) of the Act (prior to Amendment in 1971) prescribing that the income from a transferred assets can be included in the income of the transferor, provided under the transfer, the benefit of the income from such assets is immediately available or is deferred for the spouse or minor children of the settlor. It was held that if the child, for whom the benefit is provided attains majority, it is clear that the provision contained in clause (v) would not be attracted on the plain reading of clause (v) itself. Otherwise, the Legislature would not have expressed itself in the manner in which it did by providing that income from such assets is

for immediate or deferred benefit of his or her spouse or minor child. The Court held that where the benefit under the transfer is to be deferred beyond the minority of the child, section 64(v) will not be attracted.

[c] Reliance was placed on the decision of the Supreme Court in Commissioner of Income Tax v. M.R.Doshi, reported in 211 ITR 137 by which the appeal against the last mentioned decision was dismissed by the Supreme Court. The Supreme Court noted that cumulative effect of the trust deeds was that the income from the trusts was to be accumulated untill the attainment of majority by three sons of the settlor and the accumulated income was then to be divided into three equal shares and the respective one-third share of each son was to be paid to him. The question was whether the income from the trust could be included in the total income of the assessee (who had executed the deeds) under section 64(v) of the Income Tax Act, 1961. The Supreme Court held that the specific provision of law under section 64(v) as it stood before the amendment in 1971, was that the immediate or deferred benefit should be for a minor child. As the deferment of benefit in this case was beyond the period of minor of the assessee's three sons and the payment was to be made after each of the sons attain majority, the provisions of section 64(v) had no application and the income of the trust was not to be included in the total income of the assessee.

[d] The decision of the Supreme Court in Income Tax Officer v. S.K.Habibullah, reported in 44 ITR 809 was cited for the proposition that, for the purpose of assessment, an individual and a firm are distinct entities and even if an individual is a partner of the firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake apparent from the record of assessment of the individual partner. It was held that section 35(5) of the Indian Income tax Act, 1922 must be deemed to have come into force from April 1, 1952 when it was introduced by the Income Tax (Amendment) Act, 1953 and therefore, the I.T.O. had no jurisdiction under that provision to rectify the assessment of a partner of a firm consequent upon the assessment or re-assessment of the firm

disclosing an error made before April 1, 1952.

[e] The decision of the Bombay High Court in Gammon India Ltd. v. Commissioner of Income Tax, reported in 214 ITR 50 was relied upon for the proposition that the power of rectification of mistakes under section 154 of the Act is the limited power which is restricted to rectification of mistakes apparent from the record. It must be a mistake which is patent on the face of the record and does not call for detailed investigation of the facts or require an elaborate argument to establish it. A decision on a debatable point of law or failure to apply the law to a set of facts which remain to be investigated cannot be corrected by way of rectification. The expression `record' has to be construed and understood in the context in which it appears and in context of the expression `apparent from the record' in section 154, `record' would mean the record of the case comprising the entire proceedings including documents and materials produced by the parties and taken on record by the authorities which were available at the time of passing of the order which is the subject matter of proceedings for rectification. The authorities cannot go beyond the record and look into fresh evidence or materials which were not on record at the time the order sought to be rectified was passed.

[f] The decision of the Supreme Court in T.S. Balaram, Income Tax Officer v. Volkart Brothers, reported in 82 ITR 50, was cited for the proposition that a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record.

[g] The decision of the Supreme Court in M.K.Venkatachalam, Income Tax Officer v. Bombay dyeing and Manufacturing Co. Ltd., reported in 34 ITR 143 was cited for the proposition that a glaring and obvious mistake of law can be rectified under section 35 as much as a mistake of fact apparent from the record. In that case, it was found that the assessment order was inconsistent with the proviso to section 18A of

the Indian Income tax Act, 1922 and must be deemed to suffer from a mistake apparent from the record and the I.T.O. was therefore justified in exercising his power under section 35 and rectifying the mistake.

[h] The decision of this Court in The State of Gujarat v. Premier Auto Electric Ltd., reported in 45 S.T.C. 220 was cited for the proposition that the doctrine of estoppel has no place in assessment proceedings because equity is out of place in a tax law and therefore, a particular sale is either exigible to tax under the taxing statute at a certain rate or it is not and the Sales Tax Officer has no power to impose tax on a transaction of sale at a rate different from that which appropriately applies to such transaction.

[i] The decision of this court in Commissioner of Sales Tax v. Saurashtra Rachnatamak Samiti, reported in 89 S.T.C. 215 was cited to point out that this court in context of the provisions of section 67(1) of the Gujarat Sales Tax Act, 1969, held that the Commissioner was entitled to pass such order "as he thinks just and proper" in his revisional jurisdiction which was exercisable even suo motu, and that if any particular order was germane to the provisions under which the authority is acting, it cannot be said that the order would be bad in law. This proposition was invoked on behalf of the assessee in the present case in respect of the contention that in response to the rectification notice issued by the Department, if the assessee takes up a contention that the original assessment was itself uncalled for, even that can be considered by the authority proposing to rectify the assessment.

7. The learned counsel appearing for the Revenue, supporting the reasoning of the Tribunal, contended that there was no debatable question involved at all and since the rectification was to be done only by applying a correct rate of tax which in the context was the rate applicable to the total income of the beneficiary concerned in view of the provisions of section 161(1) of the said Act, which lays down that the tax was to be levied upon and recovered from the representative of assessee in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. It was contended that when the

income going to the share of these beneficiaries was assessed in the hands of the trust, the rate that should have been applied was the rate applicable to the total income of each of the beneficiaries including the income that went to their shares. It was submitted that there was no question of making any further inquiry or assessment, because, the assessment orders of the beneficiaries were just to be seen with a view to total up their respective income for the purpose of ascertaining the rate that should have been applied while assessing their income in the hands of the trust. It was further contended that the circular of the C.B.D.T. which was sought to be relied upon was not applicable to the instant case since it related to exercise of option and not to the question of rectification. It was submitted that, in any event, the circular of C.B.D.T. cannot govern the quasi-judicial exercise of powers by the authorities, nor can it be enforced against the interpretation given by the Supreme Court or any High Court to a provision of law. It was submitted that no debatable issue arose even on the basis of the circular. It was further argued that when the assessment was originally made, it was never contended by the assessee trust that the income of these beneficiaries could not be subjected to tax, because, it was required to be accumulated and therefore, no such question could have been raised in the rectification proceedings which was confined to ascertainment of the rate which was applicable for working out the tax on the total income of the beneficiaries, as against the rate which was applied in the assessment order only on the basis of their respective shares.

7.2 In support of his contentions, the learned standing counsel for the revenue cited the following decisions :

[a] The decision of the Supreme court in Mahendra Mills Ltd. v. P.B.Desai, Appellate Assistant commissioner of Income Tax, reported in 99 ITR 135 was cited for the proposition that the Tribunal's decision was, equally, with the Officer's finding with regard to the closing stock for 1959-60, relevant to and part of the `record of appeal' within the contemplation of section 35 and not extraneous to it and the Appellate Assistant Commissioner could legitimately look into it for the purpose of correcting the mistake in regard to the opening stock for 1960-61.

[b] The decision of the Supreme Court in Commissioner of Income Tax v. Kamalini Khatau, reported in 209 ITR 101, in which it was held (at page 113) that the Income Tax Officer could assess the person represented in respect of the income of the trust property and the appropriate provisions of the Act relating to the computation of his total income and the manner in which the income was to be computed would apply to such assessment. The Income Tax Officer could also assess the representative assessee in respect of that income and limited to that extent and tax could be levied and recovered from the representative assessee to the same extent as it was leviable upon and recoverable from the person represented by him.

[c] The decision of the Supreme Court in case Hindustan Aeronautics Ltd. v. Commissioner of Income Tax, reported in 243 ITR 808 was cited for the proposition that circulars or instructions given by the Board though binding in law on the authority under the Act, it will not be open to contend that a circular should be given effect to and not the view expressed in the decision of the Supreme Court or the High Court which declared the law on the question arising for consideration.

[d] The decision of this Court in Induprasad Chunibhai Patel v. Central Board of Direct Taxes, reported in 200 ITR 688 was cited for the proposition that the Central Board of Direct Taxes is not competent to give directions regarding the exercise of judicial powers by the subordinates.

[e] The decision of the Madras High Court in Estate of Khan Sahib Mohd. Oomer Sahib v. Commissioner of Income Tax, reported in 33 ITR 767 was cited to point out that, in context of section 41(1) of the Indian Income tax Act, 1922, it was held that the liability imposed by section 41(1) on a receiver appointed by court is that the tax shall be levied upon and recoverable from such a receiver in the like manner and to the same amount as it would be leviable upon and recoverable from the person or persons on whose behalf such income profits or gains are receivable.

[f] The decision of the Assam High Court in Mr. Safiullah Wakf Estate v. Commissioner of Income tax, reported in AIR 1959 ASSAM 191 was cited for its proposition that the measure of the liability of the trustee or other representative under section 41(1) of the Act of 1922, was the liability of each beneficiary and the assessment should be at the individual rate of tax applicable separately to the total income of each beneficiary.

[g] The decision of the Supreme Court in Commissioner of Wealth Tax v. Trustee of H.E.H. Nizam's Family, reported in 108 ITR 555 which was rendered in context of the provisions of section 21 and other provisions of the Wealth Tax Act, 1957, was cited for the proposition that the consequences of the provisions in section 21(1) of the Wealth Tax Act that the assessee was assessable "in the like manner and to the same extent" as the beneficiaries are three-fold. In the first place, there would have to be as many assessments on the trustees as there are beneficiaries with determinate and known shares, though for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary. Secondly, the assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee. And lastly, the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly.

[h] The decision of the Supreme Court in Jyotendrasinhji v. S.I.Tripathi, reported in 201 ITR 611 was cited for the proposition that section 166 of the Act had an overriding effect over the preceding provisions in Chapter XV and nothing contained in the preceding provisions in Chapter XV precluded the revenue from making a direct assessment upon the assessee and/or recovering the tax payable from such person. The revenue has, thus, been given an option to tax the income from a discretionary jurisdiction either in the hands of the trustees or in the hands of the beneficiaries.

8. It is a settled legal position as can be seen from the decision of the Supreme Court in Khatau's case (supra) that it was implicit in the terms of section 161(1) of the said Act that the Income Tax Officer could assess a representative assessee as regards the income in respect of which he was a representative and that he could assess either the representative assessee or the person represented by him in view of the provisions of section 166 of the Act. The Income Tax Officer could assess the person represented in respect of the income of the trust property under the appropriate provision of the Act relating to the computation of his total income and the manner in which the income amount was to be computed. When the Income Tax Officer chooses to assess the person represented in respect of the income of the trust property in the name of the trust, the computation of the total income of the person represented is to be done on the basis of the provisions which would apply to the computation of his total income while making such assessment. The assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustees. The income of all these beneficiaries was assessed in the hands of the trust under section 161(1) and there was no direct assessment made in the hands of the beneficiaries. Therefore, the total income of the beneficiary i.e. the share of income of the trust receivable by such beneficiary under the deed as well as the other income of the beneficiary which would make up his total income was required to be taken into account for the purpose of ascertaining the rate at which the total income of such beneficiary was to be taxed. Admittedly when the first assessment order was issued, the income tax officer instead of acting as per the settled position resorted to a rate of tax which was relatable only to the share of the beneficiary in the income of the trust receivable by him in the relevant year under the aforesaid clause 3(B)(i)(b) of the deed. This is why, on noticing the mistake committed by him, the ITO issued the show cause notice to the trust on 30th October 1984 stating that, in the assessment for the assessment year 1980-81 which was completed on 24th November 1980, the income falling to the share of each beneficiary had been wrongly taxed at the rate applicable to the share of each beneficiary instead of individual rate of tax calculated separately and applicable to the total income of each beneficiary. Thus, according to the I.T.O., there had been a mistake in the calculation of tax leviable on the representative assessee namely, the trustees which being a mistake apparent from the record

was proposed to be rectified under section 154 of the Act. The assessee trust was called upon to file its objections, if any and requested to intimate the total income assessed in each of the 23 beneficiaries' cases as per the assessment orders made in their cases so that the rate applicable to the total income of each beneficiary can be determined.

8.1 By its letter dated 15th November 1984, the assessee trust raised objections against this show cause notice stating that the proposal to rectify the assessment was illegal "as there is neither a mistake in your order of assessment much less the mistake apparent from the record". In para 2(a) to (e) of that letter, a contention was taken up that if at all there was a mistake, it was in taxing the trust by the assessment order on the income of respective beneficiaries and that the reply itself should be taken to be an application for rectification of mistake and refund should be given of the tax assessed under the initial order. This contention was raised on the footing that the income of the beneficiary was to be accumulated and on the authority of M.K.Doshi (supra), it was claimed that they cannot be said to be having any vested interest over the period of nineteen years from the date of the trust deed. A further contention was raised on the basis of the circular of the C.B.D.T. issued on 24-2-1967 that such inclusion of beneficiaries' income for the purpose of working out the total income even for the rate purposes amounted to an assessment of the income which was already assessed. It was submitted that, in view of that circular, there was no mistake apparent from the record committed by the I.T.O. It was finally submitted that these were highly arguable questions and therefore, no rectification should be allowed.

9. We first take up the question whether the C.B.D.T. circular which according to the Tribunal was not applicable to the assessee's case has any bearing on the question of rectification. That circular has been re-produced in the order of the Commissioner of Income tax (Appeals) and also appears on page 5006 of Volume III of Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition. The circular gives the background in which it was issued. The Board came across a case where the assessee was one of the beneficiaries in the trust in which the shares of the beneficiaries were known and determinate. The income tax officer raised an assessment on the trustees taxing the income of the trust in their hand at the appropriate rate and to the amount which would have been recoverable in the hands of the

beneficiaries. While dealing with the case of one of the beneficiaries of the trust, the I.T.O. again included for rate purposes his share in the income of the trust. In this background, while referring to the provisions of section 41 of the Act of 1922 which gave an option to the department to tax either the representative assessee or the beneficial owner of the income (which corresponded to the present provision of section 166 of the Act of 1961), directed that, "Once the choice is made by the department to tax either the trustee or the beneficiary, it is no more open to the department to go behind it and assess the other at the same time". It was stated that the inclusion of the share income from the trust in the total income of the beneficiary for rate purposes would virtually amount to an assessment of the income which has already been assessed and subjected to tax. This sentence is being taken out of context to argue that once the assessment is done, no mistake can be rectified even if the other income of the beneficiary was not included for finding out his total income to apply the correct rate of tax. One cannot read the said sentence out of its context. It is clear from the reading of the circular that the Board emphasized that once the choice is made by the department to tax either the trustee or the beneficiary, it would not be open to go behind it and assess the other at the same time. That has nothing to do with the question of rectification of a mistake that may have crept in while assessing the trustee. In the present case, it is not as if after having assessed the income in the hands of the trustee, the beneficiary is assessed again. Therefore, the circular has no application to the facts of the present case. Merely by referring to an irrelevant circular, one cannot make a simple issue a debatable one. The question whether there is a debatable point or not will not depend on endless arguments over non-issues. The length of irrelevant arguments cannot be a parameter for deciding whether a point is debatable or not. One has to adopt the standards of reasonable understanding and therefore, even when some ordinary facts are not easily understood, time consumed to sort them out cannot make obvious issues debatable issues. There should be genuineness of a debate and howsoever, prolonged frivolity there may be in discussing a point, it would not raise an obvious issue to the level of a debatable issue. In our opinion, this circular is wholly irrelevant and has no bearing on the question of rectification and has been only referred to with a view to cloud the issue for the purpose of urging that no rectification ought to be done on such a contrived debate.

10. The other aspect which is sought to be raised, namely, that the income of the beneficiaries which was receivable by them under the trust deed was to be paid to them only after nineteen years and therefore, since was to be accumulated, it was not income, was never raised at the time of the assessment and as held by the authorities below, it could never have been raised, as there was no application for rectification made on this count by the assessee trust. The show cause notice for rectification issued by the I.T.O. was limited only to the question of applying the correct rate of tax which undisputedly would be the rate on the basis of the total income of the beneficiaries which aspect emanating from the provision of section 161(1) was overlooked at the time of the assessment. Reliance on the decision of the Supreme Court in M.K.Doshi's case (supra) is wholly misconceived, because, that was a decision in context of section 64(v) of the Act and the Supreme court laid down that it had no application where the payment was to be made after the sons of the settlor attained majority since the income of the trust was not to be included in the total income of the assessee. From the decision in Doshi's case, it cannot be said by any stretch of imagination that the Supreme Court has laid down a proposition that whenever an assesse allows his income to be accumulated, he can escape tax. Merely because the payment of income which had accrued and which was credited to the accounts of these beneficiaries since it was receivable each year, was delayed over a period, it cannot be said that the income did not accrue in the relevant previous year. Section 161(1) clearly takes into account not only the income which is actually received but also the income which accrues and since under the deed, the share in the income of the trust was receivable by the beneficiaries and was to be credited in their accounts in each year, it obviously accrued and only the payment was delayed. We are making these observations, because, the learned counsel insisted on arguing this point to contend that there was a debatable point which really speaking could not have arisen, since the contention that no tax was payable as the income was to be accumulated was never taken during the assessment proceedings which culminated in the order of assessment. We make it clear that no arguable or debatable point arises on the basis of holding of the apex Court in Doshi's case, in context of section 161(1) of the Act and the present rectification order. On the reading of the said decision of the Supreme Court, no such debatable point is arising in the present case. It does not lay down that in all cases, if the income which is receivable or which is accrued is accumulated and only if the payment is delayed, it ceases

to be the income of the years in which it accrued. Such startling result would defeat the provisions of the Act and it would be very easy for any assessee to allow the income that may accrue to him to be accumulated over a period of time, and to say that it is not his income and should be treated as capital when he receives it in lumpsum.

11. We are, therefore, of the view that the Tribunal was right in holding that since such an issue was not raised by the assessee trust during the assessment proceedings by stating that the income in question was not taxable, it could not be raised now in the rectification proceedings.

12. For the reasons that we have given hereinabove, we hold that the Income Tax Officer was justified in passing the rectification order under section 154 of the said Act. The question referred to the High Court is, therefore, answered in the affirmative against the assessee and in favour of the Revenue. The reference stands disposed of accordingly with no order as to costs.

MAY 09, 2002 [R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

parmar*